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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 525

ALLEGHANY CORPORATION,
Petitioner,

against

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: March 4, 1952.

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I

Petitioner is entitled to a review at least as extensive and searching as that provided under the rule of *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474.

While the Institutional Group is unjustifiably charging your petitioner with seeking "to try the case de novo", it seeks to deny to the reviewing courts the right to determine whether the Commission's limitation of the capitalization was reasonable and logical in the light of the record in its entirety, including the body of evidence

opposed to the Commission's views,* on doubtful assumption that the expertness of the Commission renders its conclusion in this respect final. The *Camera Corporation* case, *supra*, decided seven years after the cases relied upon by the Institutional Group (Group Brief, p. 14), fully supports your petitioner's contention that the opinions in these cases were never intended to limit so drastically the reviewing power of the Courts.

In this connection the Court stated, in the *Camera Corporation* case, at page 490:

> "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

In appraising the significance of the *Camera Corporation* case, *supra* the Court in *Minneapolis-Honeywell Reg. Co.* v. *Federal Trade Commission*, 191 Fed. 2d 786, 789 (C.C.A. 7th, 1951) said:

> "And we think the evidence supporting the conclusion may become even less substantial when it fails to persuade an experienced member of the Commission who dissents from its findings and conclusions."

It is submitted that the District Court and the Circuit Court of Appeals erroneously limited their review of the Commission's conclusions and findings in accordance with the contentions of the Group here and before such Courts.

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* *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474 (1951), Institutional Group Brief, pp. 13, 14, 15, 20, 21.

It is obvious that the District Court felt bound by the Commission's conclusions as to physical values based solely on the Bureau's report, which is merely *prima facie* evidence, and that it felt equally bound by the Commission's conclusions as to economic trends and changed conditions affecting earning power.* Furthermore the District Courts comparison of the 1946 and 1948 valuation data indicates that it mistakenly regarded the Bureau's 1946 valuation as having been computed on the actual 1946 cost index factors.** That the Circuit Court of Appeals felt absolutely bound by the Commission's finding as to reorganization value is shown by the following statement:

> "The action of the Commission in determining the reorganization value was taken in the field where its conclusions are binding." ***

There are no statements or intimations in the opinions of the District Court or the Circuit Court of Appeals that they gave any consideration to the dissenting opinions of Commissioner Alldredge, joined in by Commissioner Atchison, both able and long experienced as members of the Commission. Commissioner Alldredge in his dissent to the Fourth Supplemental Report said:

> "A study of the record in this proceeding indicates to my mind that the majority has been overly conservative in its estimate of future earnings of the Missouri Pacific system, particularly if weight is given to the substantial improvement in the main component of the system. This conservatism may be attributable to the fact that the conditions which have enabled favorable earnings to continue since

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* P. R. III, p. 922.
** P. R. III, p. 921.
*** P. R. V, p. 30; *State of Texas* v. *Group of Institutional Investors*, 191 Fed. 2d 265, 273.

> the close of the war have not yet had an opportunity to demonstrate clearly the extent and the permanency of the improvement over the disastrous prewar earnings record of this system. Any such forecast of future events necessarily is fraught with difficulties, but there are good reasons for believing that in the situation here presented future performance will be substantially better than the peacetime record of the past. The majority has given some recognition to this prospect but I believe it could have reasonably gone further." *

In his dissent to the Fifth Supplemental Report he suggests a provisional increase in the capitalization to meet the Congressional intent enacted in Section 77(b)(3) of the Bankruptcy Act.**

The inadequate review of these dissenting opinions and the significant facts opposed to the Commission's views discussed in the petition for writ of certiorari, requires a review by this Court to determine whether the Commission's limitation of the capitalization can conscientiously be sustained as reasonable and logical in the light of the entire record.

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* D.C.R., pp. 28633-28634.
** D.C.R., pp. 28685-28686.

II

A Statement that the Commission has considered the entire record is insufficient if the conclusions reached are not reasonable and logical.

A

Discounting of Neff's estimate of Income available for fixed charges due to increase in citrus and chemical traffic.

The Group argues that because the Commission asserted that its normal year's earnings "are not the result of mere additions of prospective earnings from citrus and traffic to the trustees normal-year forecasts", the Commission may properly disregard $1,172,731 of his estimate, although there is not a scintilla of evidence to show that his estimate was in error.* This is merely to argue that all the other earning potentials had declined between 1939 and 1948 to the extent of $1,172,731, which capitalized at 4½% amounts to slightly more than $26,000,000. The unreasonableness of such an assumption and argument is conclusively demonstrated by the important changes which have occurred since 1939. The record is devoid of evidence showing that the earning potential from all sources other than citrus and chemical traffic has thus declined since 1939. This is merely one example showing how important it is to examine the reasonableness of the Commission's conclusions based on its alleged consideration of the whole record. Since our petition contains a discussion of additional examples further consideration of the subject is unnecessary.

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* Institutional Group Brief, p. 19.

B

The Earning Statistics do not reflect the "Earning Power" of the System.

The Institutional Group's argument in the footnote at the bottom of page 19 of its brief has been anticipated in our petition for a writ of certiorari, pages 38-46. Nothing need be added except to observe that the Group's argument merely begs the question as to what extent the denial of fair rates requires the earning statistics to be increased for the purpose of fixing the maximum capitalization.

CONCLUSION

The petition of Alleghany Corporation should be granted.

March 4, 1952.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 526

MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE,
Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS,
BONDHOLDERS PROTECTIVE COMMITTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY FIRST MORTGAGE,
EDMUND WRIGHT, et al.,
PROTECTIVE COMMITTEE FOR HOLDERS OF GENERAL MORTGAGE BONDS,
MANUFACTURERS TRUST COMPANY, as Trustee,
BANKERS TRUST COMPANY, as Trustee,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals for the Eighth Circuit.

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IN THE

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MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE,
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v.

GROUP OF INSTITUTIONAL INVESTORS,
BONDHOLDERS PROTECTIVE COMMITTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY FIRST MORTGAGE,
EDMUND WRIGHT, et al.,
PROTECTIVE COMMITTEE FOR HOLDERS OF GENERAL MORTGAGE BONDS,
MANUFACTURERS TRUST COMPANY, as Trustee,
BANKERS TRUST COMPANY, as Trustee,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals, for

the Eighth Circuit, to review the order and judgment of that Court rendered in the above cause, affirming the order, judgment, and decree of the District Court of the United States, for the Eastern District of Missouri.

JURISDICTION.

Jurisdiction of this Court is invoked under Title 28, United States Code, Judiciary and Judicial Procedure, Section 1254.

The date of the order and judgment of the Circuit Court of Appeals, for the Eighth Circuit, was August 14, 1951.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (R. 1033*) is reported in 93 F. Supp. 832. The opinion of the Circuit Court of Appeals is reported in 191 F. (2d) 265.

SUMMARY STATEMENT OF THE CASE.

This case involves the validity of procedures adopted by the Interstate Commerce Commission (hereinafter called the "Commission") in the promulgation by a majority of the Commission of a plan of reorganization Missouri Pacific Railroad Company (hereinafter called "MOP"), New Orleans, Texas & Mexico Railway Company (hereinafter called "NOTM") and International-Great Northern Railroad Company (hereinafter called "IGN") commonly referred to in these proceedings as the "principal debtors," and as respects NOTM and its subsidiaries, as "Gulf Coast Lines."

On March 31, 1933, MOP filed a petition for reorganization under Section 77 of the Bankruptcy Act and

* References to the transcript of the record are indicated by the letter "R." References to exhibits are indicated by the letters "Ex." Arabic numerals in all instances indicate pages.

caused its controlled and dominated subsidiary NOTM to do the same. Since then, NOTM has remedied all of its defaults as respects its publicly held obligations and for a number of years past has met all of its publicly held obligations currently and is in a position to continue to meet them as they mature.

Prior to bankruptcy, MOP supplied NOTM with funds, termed "advances" by MOP rather than capital investments. These so-called "advances" together with interest thereon constitute the inter-company indebtedness of NOTM to MOP which presently provides the sole basis for the inclusion of NOTM in the plan of reorganization of its parent MOP.

The plan of reorganization for the parent MOP required stockholders of NOTM to surrender their stock for securities of the new company on terms that an elementary mathematical calculation discloses results in the appropriation of millions of dollars belonging to NOTM stockholders.

The Commission places a value of $150 per share on NOTM based upon the development of a separation capitalization for NOTM. The capitalization serves no other purpose than fixing the value of NOTM stock as the plan does not contemplate the issuance of any NOTM securities.

The Commission relies upon its asserted power under Section 77 to order the assets of NOTM to be transferred to its parent MOP without observing the requirements, purposes and policies of Section 5 of the Transportation Act as required by Section 77 (f).

Petitioner contends that:

(a) The inter-company debt of the subsidiary NOTM to its parent MOP does not provide a valid basis for the inclusion of NOTM in the reorganization of its parent MOP.

(b) The proposed plan appropriates the property of NOTM stockholders for the benefit of others having no interest therein.

(c) The Commission has no right or authority to set up a capitalization of NOTM for the sole purpose of a sale of the property of NOTM to a particular private purchaser on terms dictated by the Commission while depriving pledgees of the right to reduce NOTM stock to possession.

(d) The Commission is without the power to effect the transfer of the assets of NOTM to its parent MOP without observing the requirements of Section 5 of the Transportation Act.

FACTS.

This petition is submitted on behalf of Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders' Committee, duly authorized by order of the Interstate Commerce Commission, in conformity with Section 77 (p) to solicit authorizations to represent bondholders. On the bankruptcy of MOP, $12,140,000 of these bonds were outstanding, secured by MOP's pledge of 121,460 shares, or approximately 82%, of NOTM's only class of capital stock. Since bankruptcy, in the years 1947 and 1949, the Bankruptcy Trustee acquired an aggregate of $1,715,000 principal face amount of these bonds at a discount of $1,373,-356.67 from the face amount of the claims represented by them, thus reducing the principal face amount presently outstanding in the hands of the public to $10,425,000.*

* Appendix D of the Plan reflects the first acquisition by the Bankruptcy Trustee but does not reflect the additional acquisition of $820,000 principal face amount acquired in 1949.

The Value of the NOTM Stock Pledged as Collateral for the Satisfaction of the Claim of the Secured Serial 5¼% Bonds.

As the Secured Serial 5¼% Bonds look primarily to their collateral for the satisfaction of their claim, its value is the crucial point in determining the treatment to which they are entitled in any plan of reorganization. As the collateral is capable of being liquidated, they enjoy a distinct advantage as compared with other secured creditors, such as the First and Refunding Mortgage 5% Bonds and the General Mortgage 4's, whose security cannot be similarly liquidated.**

While the right to reduce the collateral to possession is arrested by the filing of a petition for reorganization under Section 77, the exercise of this right would be the simplest way to conclusively determine its value.† Absent such right, we shall consider briefly the business criteria for appraising the value of the collateral.

(a) **Net Worth of NOTM:**

The simplest and most direct step toward the beginning of an appraisal of the value of the collateral from the standpoint of assets is to compute its value on the basis of the balance sheet.

Attached hereto, as Appendix A, are comparative Consolidated Balance Sheets of NOTM ("Gulf Coast Lines"), as of December 31, 1947, and December 31, 1950.‡ The

** At the date of bankruptcy, Reconstruction Finance Corporation, Railroad Credit Corporation and the Secured Bank creditors held obligations secured by collateral all of which have been paid off in cash in the course of the proceedings.

† Appellant has not sought in these proceedings to disturb the existing ownership by MOP of NOTM but contends that MOP having pledged the controlling interest in an extraordinarily profitable and strategic property for the satisfaction of its obligations to the Secured Serial 5¼% Bonds, they may not be required to surrender their collateral unless their claim is discharged in cash in full or they receive the full equivalent of cash.

‡ In both cases the surplus account is treated as were the similar items in the Consolidated Balance Sheets upon which this Court, in Comstock

former discloses a net worth as of that date of $24,786,542, giving a book value to NOTM stock of $167.10 per share. Corresponding figures on the latter date, disclose a net worth of $34,680,313, or a book value of $233.80 per share, an increase of $66.70 for the period.

A consideration of the figures set out above discloses that, independently of a value arising from "separate capitalization", the value of the assets represents a value per share for NOTM stock which, translated in terms of the aggregate value of the collateral securing the Secured Serial 5¼% Bonds, far exceeds the amount of their claim.

(b) **Capitalization of NOTM:**

The capitalization of NOTM is simple. Charges on the equipment obligations vary from year to year, depending upon the amount outstanding. Interest on the First Mortgage Bonds presently outstanding, which carry rates as high as 5½%, amounts to $2,080,145, and on the intercompany claim at contract rates, amounts to $583,087. After the provision for charges on the debt, and the determination of the amount payable on account of Federal Income and Excess Profit Taxes, all the remaining income belongs to the stockholders of NOTM and to no one else. With a very low share capital of only one class, the book value of each share is susceptible to very rapid increases which is reflected in a corresponding increase in the value of the collateral. This is demonstrated by the fact that the value of the collateral, measured by the book value,

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v. Institutional Investors (163 F. 2d 350), found the courts below were justified in relying, in determining the issues therein raised. If, as the Commission contends, in the Fifth Supplemental Report (R. pp. 28663/4), that $5,534,283 represents a "fictitious property value," it is only necessary to point out that this sum was included in the P. & L. Surplus in the years under review in the Comstock case, and was not transferred to a separate caption until after the District Court's decision in that case. If this Court was correct in 1948 in relying upon such a Consolidated Balance Sheet, as did the courts below, it is curious that the Commission finds itself in disagreement with the accounting standards for this Company established by this Court.

amounted on December 31, 1947, to $20,295,966, as compared to an aggregate claim of the Secured Serial 5¼% Bonds in the hands of the public on that date, of $20,-149,634, while on December 31, 1950, the collateral on the same basis had a value of $28,397,348, as compared with the claim of the Secured Serial 5¼% Bonds, publicly held, of $20,322,235.

(c) **Earnings applicable to NOTM stock:**

The effective date of the predecessor Plan, to the one under review, was January 1, 1943. From that date to January 1, 1948, the effective date of the pending plan, the net earnings applicable to NOTM stock amounted to $14,969,996 (R. pp. 28528-9), or an annual average of $2,993,999. For the period from January 1, 1948, to December 31, 1950, the aggregate net earnings applicable to NOTM stock have amounted to $10,644,255, or an annual average of $3,548,085. It must be borne in mind that net earnings applicable to the stock reflect all charges for maintenance of road and equipment, and that additional investments in these accounts, before additional earnings are reflected, involve increases to charges to operating expenses directly and increased charges for depreciation, so that there is a lag between additional investments and the anticipated earnings to be derived therefrom.

These figures show that for the period January 1, 1943, to December 31, 1950, the total earnings applicable to NOTM stock amounted to $25,614,251. 82% of these earnings, or $21,003,685, accrued to the collateral pledged for the satisfaction of the Secured Serial 5¼% Bonds, or a sum in excess of the total claim of that issue on December 31, 1950.

Earnings of this size, applicable to the collateral, fully support the contention that its value is very much greater than the claim of the Secured Serial 5¼% Bonds.

(d) **Value to a purchaser to whom the element of control will insure a profitable relationship in the control of the interchange of traffic:**

In appraising the value of the collateral, consideration must be given to what the loss of control would mean to MOP by reason of the potential loss of valuable interchange of traffic. Testimony offered in connection with the present Plan (I. C. C. Ex. 969) shows that NOTM carload traffic in 1947 had increased more than 400% during the bankruptcy proceedings. It is evident that as the amount of NOTM traffic has increased and as the territory served continues to grow, the value to MOP of the interchange of traffic with NOTM is immeasurably more valuable than it was when MOP acquired control of NOTM in 1924. The Commission has made no study of the interchange of traffic between MOP and NOTM in terms of dollars and cents of the operating income in any of its reports dealing with this reorganization.

It is not to be supposed that if MOP was confronted with the possibility of losing control of NOTM, that it would hesitate to redeem the pledged securities by the full satisfaction of its obligations to the Secured Serial 5¼% Bondholders. This factor, which the Commission has not dealt with in these terms, must be given its proper weight in any consideration of the value of the collateral.

The Method Employed by the Commission for Appraising the Value of the Collateral Pledged for the Satisfaction of the Secured Serial 5¼% Bonds.

The Commission ignores the methods of valuation outlined above and adopted a procedure not provided for in Section 77.

This procedure involved

> "the fixing of a separate capitalization of New Orleans for the purpose of determining the value of Missouri Pacific's ownership of the stock" (R. p. 28584).

Having developed a "separate capitalization" at $83,700,000, the Commission then deducted the aggregate claims as of December 31, 1947, amounting to $61,428,541, and found the remainder to represent just over $150 per share for each of the 148,329 shares of NOTM outstanding. When it is obvious that the development of a separate capitalization is not a step to the separate reorganization of NOTM, involving a determination of the total amount of issuable securities and the quality of the securities to be issued, a careful scrutiny of the procedure is required. The striking difference between the procedure which appraises value by the relationship of assets and liabilities and that which attempts to determine it by the device of separate capitalization is crystal clear. While the former method recognizes that the position of a pledgee is not static, but is in direct relation to the value of the collateral the latter **limits the valuation of the collateral irrespective of its actual value.** Thus, under the Commission's method, the value of the collateral remains unchanged as of December 31, 1950, despite the fact the value of each NOTM share had increased $66.70 in the period, with a resultant increase in the book value of the collateral pledged for the satisfaction of the Secured Serial 5¼% Bonds in the period by over $8,100,000.

The Securities Allocated Under the Plan to NOTM Stock and the Proposed Distribution Thereof as Respects the Collateral Pledged for the Satisfaction of the Secured Serial 5¼% Bonds.

The Plan provides that NOTM capital stock

> "shall receive for each $100, par value, of said stock, approximately $75, principal amount, of general-mortgage bonds, Series A, $75 of general-mortgage bonds, Series B, and $25 of common stock, Class A, at a stated value of $100 per share" (R. p. 28746).

This allocation of new securities applied to the 121,460 shares of NOTM, pledged for the satisfaction of the

Secured Serial 5¼% Bonds, would require the issuance of $18,219,000 general mortgage bonds and 30,365 shares of Class A Common Stock. The resultant distribution to each $1,000 principal amount of Secured Serial 5¼% Bonds presently outstanding would be approximately $1,750 of general-mortgage bonds and approximately $29 of Class A Common Stock.

The Plan provides that the Secured Serial 5¼% Bonds, as respects these three classes of securities,

> "shall receive for each $1,000 bond and unpaid interest thereon to January 1, 1948, approximately $750, principal amount, of Series A general-mortgage bonds, $750, principal amount, of Series B general-mortgage bonds . . . and $250 of common stock, Class A, at a stated value of $100 per share" (R. p. 28743).

This means that only $15,637,500 of general-mortgage bonds and 26,062.50 shares of common stock, Class A, will be issued in lieu of the 121,460 shares of NOTM stock pledged for the satisfaction of the Secured Serial 5¼% Bonds instead of $18,219,000 of bonds and 30,365 shares of Class A Common Stock.

This reduction of $2,581,500 of general-mortgage bonds and 4,302.50 shares of Class A Common Stock is brought about as the result of a pro rata allocation by the Commission of the aggregate of securities to which the collateral is entitled between the bonds publicly held and the $1,715,000 principal amount acquired by the Bankruptcy Trustee in the course of the proceedings to which reference has been made above. In brief, the Commission has not only frozen the value of the collateral by the employment of the separate capitalization device, but has made a determination completely outside its authority as to the claimants entitled to receive securities allocated to collateral required to be surrendered under a Plan of Reorganization.

The Appropriation of the Property of NOTM Stockholders for the Benefit of Others.

The appropriation is clearly disclosed by the following elementary mathematical computation which shows the appropriation which would have resulted in the three year period 1948-1950, inclusive, if the pending plan had been in operation:

Net Income 1/1-1948 – 12/31-1950, applicable to NOTM stock	$10,644,255
82% thereof applicable to collateral pledged for satisfaction of Secured Serial 5¼% Bonds	8,728,289

The $8,728,289 of earnings applicable to the collateral remains the proportionate share of NOTM earnings for the security of the bonds whether it is distributed as dividends or not. No one else is entitled to participate in a distribution of them. If, however, NOTM is consolidated as proposed, these aggregate net earnings will be available for distribution to claimants holding securities senior to those allocated to NOTM stock and be shared by others who participate in the allocation of the same securities allocated to NOTM stock. It is, therefore, necessary to examine the extent to which these earnings which have accrued in the three years, since the effective date of the Plan, would have been distributed:

Total earnings applicable to the collateral pledged for the satisfaction of Secured Serial 5¼% Bonds		$8,728,289
Less accruals on securities allocated therefor under the pending Plan:		
Interest on $7,818,750 Series A Gen. Mtge. 4¼% Bonds (13⅓%)	$1,055,531	
Interest on $7,818,750 Series B Gen. Mtge. 4⅛% Bonds (13⅓%)	1,055,531	2,111,062
Balance		$6,617,227
Less estimated accumulation of available income for 26,062.50 shs. Class A Common		390,937
Balance appropriated for benefit of others		$6,226,290*

* If for the sake of argument, which we do not admit, the percentage of NOTM stock applicable to the publicly held bond is only 70% of the outstanding shares on the basis of pro-rata allocation provided for by the Commission, the appropriation would nonetheless amount to approximately $5,000,000.

These facts make it clear that the proposed Plan appropriates the property of NOTM stockholders for the benefit of others, the appropriation amounting to over 71% of the amount accruing to them as stockholders of NOTM in a period of three years.

The Requirements of Section 5 of the Transportation Act.

The Plan is based upon the assumption upon the part of the Commission that the requirements of Section 5 of the Transportation Act may be ignored, despite the consistency provisions of Section 77 (f). Substantial additions have been made to the Transportation Act since 1935, but it is significant that none of them have resulted in the elimination of the requirement that Section 77 shall be consistent therewith. Absent any change in this respect by Congressional enactment, no warrant exists for the Commission to ignore the requirements of law in promulgating a plan of reorganization.

NATURE OF THE PROCEEDINGS BELOW.

The Courts below have predicated their opinions upon those assumptions upon which the majority of the Commission predicated the plan of reorganization. This is litigation over such orders, but the issues, while arising out of procedures employed by the Commission in the promulgation of its plan, are, by their nature, also independent of any particular plan.

The pending plan having been referred to the Commission by the District Court in conformity with a petition filed under Section 208, a review of this case will not delay the reorganization.

THE QUESTIONS PRESENTED.

1. Whether it is consistent with the purposes and intent of Section 77 that a proceeding thereunder be predicated upon an intercompany account between debtors participating in the same proceeding.

2. Whether a Court may permit the appropriation of the property of one group to pay the claims of another.

3. Whether the development of a separate capitalization for the purpose of determining the value of stock, including stock pledged for the satisfaction of a debt, is within the power of the Commission.

4. Whether a plan of reorganization under Section 77 may be legally consummated without full observance of the intent, purposes and requirements of Section 5 of the Transportation Act (U. S. C. 49, Chapter 1).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

POINT I.

The Decision of the Circuit Court of Appeals for the Eighth Circuit Is in Conflict With the Purposes and Intent of Section 77 in Permitting a Proceeding Thereunder to Be Predicated Upon an Inter-Company Account Between Debtors Participating in the Same Proceeding.

The judgment of the Court below ignores the fact that the continued participation of NOTM in the reorganization of its parent MOP is supported only by the existence of an intercompany account which NOTM owes to MOP. If this obligation did not exist it is obvious that there would

be no vestige of excuse for NOTM's participation in the proceedings, and its position with respect to its parent MOP would be indistinguishable from other subsidiaries of MOP that are not in reorganization, including the Texas & Pacific Railway Co.

Continuing to rely on NOTM's 1933 petition (R. pp. 28547, 28643, 28651) the Commission proposed a plan of reorganization which provided for the inclusion of NOTM and its consolidation with its parent MOP. As a consequence, the Courts below conclude that the Commission has the statutory power

> "to require a merger or consolidation of affiliated railroads under Section 77 of the Bankruptcy Act **when all of the railroads are before the Commission as debtors seeking reorganization and that in such a case the Commission is not required to follow the provisions of the Interstate Commerce Act.**" (Emphasis supplied.) (R. p. 939, CR, p. 22.)

The transparency of the fiction that an intercompany obligation may validly support a participation of NOTM in the reorganization of its parent MOP is revealed by both the Commission and the administrative Court.

The Commission discloses the transparency of this fiction by its finding that independently of value arising from separate capitalization

> "The earnings and property value of New Orleans justify values equal to the principal amount for Missouri Pacific advances to New Orleans (including interest)" (R. p. 28563)

and by the admission that while the intercompany indebtedness is "payable on demand" that "it would constitute an obligation which might require payment at any time" in the contingency that "New Orleans were separated from the system" (R. 28550).

In the case of the administrative Court, which conducts the affairs of the debtors through the agency of a common bankruptcy trustee, that Court's judgment that

> "To keep a debtor which is able, or which can become able by refunding to meets its debts as they mature in a Section 77 proceeding would not be in accord with the policy of that Section and would be in violation of the Fifth Amendment" (R. p. 1039)

the transparency of the fiction is vividly illuminated by the response of the bankruptcy trustee at an earlier hearing in the following colloquy:

> "Q. (By Mr. Biggs) Have you initiated as Trustee of N. O. T. & M. any steps to take New Orleans, Texas & Mexico out of bankruptcy? A. I have not initiated any steps to take the New Orleans out of bankruptcy" (R. p. 1020).

To urge that under the direction of the Court that the trustee of NOTM could not negotiate with himself as trustee of MOP and arrive at a fair and equitable accommodation as to any rearrangement of the inter-company obligation which NOTM owes to its parent MOP would simply be to add another fiction of even greater transparency.

It is plainly inconsistent with the intent and purposes of Section 77 that the provisions of this act should be invoked in connection with an inter-company claim between a parent and subsidiary debtor.

Such a condition if uncorrected will result in a serious encroachment on the protection to which public investors are entitled.

POINT II.

The Decision of the Circuit Court of Appeals for the Eighth Circuit Is in Conflict With the Decision of This Court in the Milwaukee Case in Permitting the Property of One Group to Be Appropriated to Pay the Claims of Another.

The Court below completely ignores the violation of rule of this Court in the Milwaukee case (318 U. S. 523) as shown by the elementary mathematical calculation set out above which showed the appropriation of the property of NOTM stockholders which would have resulted in a three year period had the plan under review been in operation.*

It appears that the Court below conceived that the decisive issue was simply the determination of capitalization and the allocation of securities, and completely failed to come to grips with the problem of appropriation which the application of the plan so clearly reveals. The financial intricacies of a railroad reorganization are such that as this Court pointed out in the Milwaukee case, "The property of one group will be subtlely appropriated to pay the claim of another while lip service is rendered the principles of priority" (318 U. S., p. 570). The figures which reflect the appropriation in the instant case are actual dollar and cents figures recorded on the books of the corporation in conformity with the regulations of the Commission. They are not a "mathematical formula" as that term appears in the Milwaukee case (318 U. S., p. 566).

The figures presented above and in Appendix A speak far more eloquently than any argument. Unless the proposed consolidation of NOTM with its parent MOP is arrested, protection against "subtle appropriation" heretofore afforded by the principles enunciated in the Milwaukee case will be completely dissipated.

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* The court below appears to have thought this appellant's objections were presented by others, and given no consideration to appellant's presentation of this point.

POINT III.

The Decision of the Circuit Court of Appeals for the Eighth Circuit by Approving the Development of a Separate Capitalization for NOTM for the Purpose of Determining the Value of NOTM Stock, Extends the Powers of the Commission in Matters of Capitalization Beyond Those Established in the Western Pacific Case.

The aggregate value of marketable collateral consisting of a single class of common stock carrying control depends on the net worth of the company, earnings applicable to the shares, and its value to investors or to a purchaser to whom the acquisition of control brings other advantages. Section 77 (b) affords a means for the determination of the value of such a block of shares in the provision for "the sale of all or any part of the property of the debtor at not less than a fair upset price."

As set out in the Western Pacific case, this Court has clearly outlined the powers of the Commission in matters of capitalization in the following language:

> "The development of the capitalization of the reorganized company which is entrusted solely to the Commission under the requirement that the plan be compatible with the public interest is that relating to the total amount of issuable securities and the quality of the securities issued" (310 U. S., p. 474).

It is conceded that there is no intention of issuing any new securities of NOTM in connection with these proceedings. Certainly in defining the powers of the Commission in the language employed in the Western Pacific case, this Court did not contemplate that the Commission would employ the device of capitalization to freeze the value of collateral pledged for the satisfaction of a debt to a figure less than the claim of a pledgee at a moment when the collateral was rapidly increasing in value. As a result,

although there has been an increase in net worth applicable to the collateral of more than $8,100,000 which we have pointed to above, its value remains the same on the basis of capitalization.

To permit the employment of the Commission's powers with respect to matters of capitalization in such a fashion, would constitute an approval of the result reflected in the instant case.

POINT IV.

The Decision of the Circuit Court of Appeals for the Eighth Circuit Fails to Deal With Basic Questions of Law Inherent in the Proposed Consolidation Contemplated by the Plan of Reorganization by Reason of the Failure of the Plan to Provide for Full Observance of the Requirements of Section 5 of the Transportation Act (U. S. C. 49, Chapter 1).

Briefly, Section 5 requires applications to the Commission upon the part of the companies proposing to consolidate, requires a consideration of the inclusion, or failure to include, other railroads in the territory, and the assent thereto by the requisite votes of the stockholders.

Section 77 (f) provides that

> "Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of Chapter 1 of Title 49 as of on August 27, 1935, or thereafter amended."

We submit that basic questions of law are not resolved by the decisions of the Court below where the Court finds no occasion in its opinion "to add to what the Commission

in its report and the District Court in its opinion have said in support of the legality and propriety of those provisions of the plan prescribing a system reorganization" (CR p. 25).

We submit that this Court should resolve this conflict.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should be granted. Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit to review the order and judgment of that Court in the above cause, and that said order and judgment be reversed; and that your petitioner be granted such other and further relief as may seem proper.

Respectfully submitted,

WILLIAM H. BIGGS,
Security Building,
St. Louis 2, Missouri,
Attorney for Petitioner.

APPENDIX A.

GULF COAST LINES

COMPARATIVE BALANCE SHEET

DECEMBER 31, 1950 AND DECEMBER 31, 1947

ASSETS	December 31, 1950	December 31, 1947
Investments:		
Road and equipment property	$102,856,495.25	$ 86,602,407.55
Acquisition adjustment	(49,466.39)	(47,417.84)
Donations and grants	(3,974,466.90)	(3,967,997.37)
Accrued depreciation—road	(2,166,349.78)	(1,412,203.88)
Accrued depreciation—equipment	(7,617,519.10)	(7,393,741.57)
Accrued amortization of defense projects—road	(991,211.15)	(1,019,410.00)
Accrued amortization of defense projects—equipment	(3,863,231.03)	(3,493,466.71)
Capital and other reserve funds	2,102,766.33	1,511,887.10
Maintenance funds	.....	256,866.20
Miscellaneous physical property	4,113,300.07	3,693,478.70
Accrued depreciation—miscellaneous physical property	(490,298.32)	(210,919.69)
Investments in affiliated companies—pledged	3,367,775.71	3,367,775.71
Investments in affiliated companies—unpledged	3,547,462.06	2,725,823.55
Other investments—unpledged	1,061.00	1,001.00
Total investments	$ 96,836,317.75	$ 80,614,082.75
Current Assets:		
Cash	$ 3,349,731.67	$ 2,860,337.06
Temporary cash investments	4,919,234.90	4,289,937.70
Special deposits	603,590.15	1,442,483.44
Loans and bills receivable	.....	31,700.00
Net balances receivable from agents and conductors	911,360.46	686,182.59
Miscellaneous accounts receivable	2,059,681.05	1,362,513.61
Materials and supplies	2,071,185.64	2,615,448.80
Interest and dividends receivable	2,171.40	1,087.94
Accrued accounts receivable	1,723,221.67	911,368.32
Other current assets	41,746.14	100,384.33
Total current assets	$ 15,681,923.08	$ 14,301,443.79
Deferred Assets:		
Working fund advances	$ 9,769.96	$ 9,145.06
Other deferred assets	239,217.55	251,847.18
Total deferred assets	$ 248,987.55	$ 260,992.24
Unadjusted Debits:		
Prepayments	$ 93,657.33	$ 100,071.98
Other unadjusted debits	676,480.42	1,559,455.89
Total unadjusted debits	$ 770,137.75	$ 1,659,527.87
Total assets	$113,537,366.09	$ 96,836,046.65

LIABILITIES AND NET WORTH	December 31, 1950	December 31, 1947
Stock:		
Capital stock	$ 15,000,000.00	$ 15,000,000.00
Less—portion held by or for company	167,100.00	167,100.00
Total stock	$ 14,832,900.00	$ 14,832,900.00
Long Term Debts:		
Funded debt unmatured	$ 42,645,900.00	$ 42,645,900.00
Less—portion held by or for company	2,030,000.00	2,030,000.00
Total	$ 40,615,900.00	$ 40,615,900.00
Equipment obligations	7,027,085.20	2,720,960.24
Amounts payable to affiliated companies	19,586,041.26	18,091,680.92
Total long term debt	$ 67,229,026.46	$ 61,428,541.16
Current Liabilities:		
Traffic and car services balance—credit	$ 377,069.12	$ 405,256.97
Audited accounts and wages payable	3,242,730.18	3,320,549.85
Miscellaneous accounts payable	428,425.14	389,751.23
Interest matured and unpaid	165,713.58	444,682.05
Dividends matured and unpaid	4,604.00	4,610.00
Unmatured interest accrued	648,471.12	605,380.90
Accrued accounts payable	1,083,638.09	1,397,051.12
Accrued tax liability	3,990,535.91	2,322,156.38
Other current liabilities	467,874.08	422,449.35
Total current liabilities	$ 10,409,061.22	$ 9,311,887.85
Deferred Liabilities:		
Other deferred liabilities	$ 440,751.56	$ 263,311.30
Unadjusted Credits:		
Maintenance reserves	$	$ 180,797.81
Other unadjusted credits	778,213.60	864,966.50
Total unadjusted credits	$ 778,213.60	$ 1,045,764.31
Surplus:		
Excess of book value of securities of subsidiary companies at date of acquisition over cost thereof	$ 5,534,282.94	$ 5,534,282.94
Unearned surplus	34,666.12	16,204.34
Earned surplus—appropriated	2,917,280.27	2,248,206.30
Earned surplus—unappropriated	11,361,183.92	2,154,948.45
Total surplus	$ 19,847,413.25	$ 9,953,642.03
Total liabilities and net worth	$113,537,366.09	$ 96,836,046.65

NET BOOK VALUE PER SHARE

	December 31, 1950	December 31, 1947
Total Assets	$113,537,366.09	$ 96,836,046.45
Total Liabilities	78,857,052.84	72,049,504.62
Net Worth	$ 34,680,313.25	$ 24,786,541.83
Book Value Per Share (148,329 shares)	$ 233.80	$ 167.10

( ) = Credit balance.